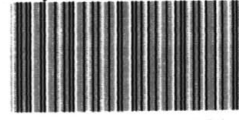


A Review of the Fisheries Dispute

by Albert Calvin Markley

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A senior thesis project of the University of Kansas



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A Review of the Fishery Dispute.

The present question of dispute between Great Britain and the United States is an old and ever recurring one. It has been a "bone of contention" between the two countries ever since their separation in 1783. The recent attitude of Canada toward and the cruelty inflicted upon our fishing crews that have happened to come within the waters over which she claims jurisdiction has brought the question prominently before ~~the people~~ our legislative bodies and before the people. The unanimity with which the most conservative body in the land, the Senate, by a vote of 46 to 1 empowered the president to declare retaliation measures upon Canadian ships and commerce is only an expression of the indignation of the American citizens at the unneighborly treatment - ~~on the part~~ of Canada of our citizens and at the insult offered our flag in Canadian ports.

Since the treaty of 1818 each recurring season has brought one of continual strife and often actual collision between the fishermen of the two countries, resulting in a series of complaints which have at times brought the two countries to the

verge of war. And the outcome of these troubles will be war if the two governments are not wise enough to prevent the portending struggle by a fair and satisfactory settlement of the points in dispute by treaty.

Wars have resulted from fewer and weaker complaints than those made against Great Britain in the last few years. Let these conflicts between the fishing crews once result in bloodshed and the "little folt" may result in a conflict that will shake the two continents.

The fact that this question is an old one and that the points of dispute out of which this strife between the Canadian fishermen and those of the United States has arisen have been argued fully by able men on each side in the last ⁷⁰ years; And that three temporary treaties have been made for the purpose of settling these difficulties makes it becoming the American people to deal with this question calmly and with due regard to ^{the} existing treaties and laws of the two countries. Local abuse and threats of war will only delay the final and equitable settlement of this question which is at present both countries desire to affect.

In concluding the Peace of 1783. this question was a point of considerable importance. The

right of American fishermen to fish anywhere along the Atlantic coast, was firmly held by our commissioners and the result was that this liberty of fishing was acknowledged in the third article of the treaty. The three things especially settled by this treaty were:

- (1) the independence of the thirteen colonies
- (2) the territorial limits of the United States
- (3) the right to fish in all waters which the citizens of the United States exercised as British subjects. Our Commissioners claimed the privileges named in the Third Clause not as a new but an existing right. This

X "We considered that treaty as a Division of the Empire. Our independence, our rights to territory and to the fisheries as practised before the Revolution, were no ~~grants~~ more a grant from Britain to us than the treaty was a grant from us of Canada, Nova Scotia, England, Scotland and Ireland to the British. The treaty was nothing more than mutual acknowledgment of antecedent rights." The third clause we have always held to be as perpetual and inviolable as the first and second clauses of the same treaty.

In the contest of the English and French for the Newfoundland and adjacent coasts in the 17th and 18th centuries the colonies bore the brunt of the struggle. It was colonial troops and provisions that maintained the

49 days siege of Louisburg, the Dunkirk of America in 1746. The capture (the turning point of the war) was pronounced in the House of Commons "an everlasting memorial to the zeal, courage and perseverance of the troops of New Eng.

And in the second siege of Louisburg were to be found many boys who were afterwards Revolutionary heroes. It was a sense of having earned the right that induced the colonies to stand so firmly for this liberty of fishing on any of the coasts; and even to declare that peace would not be accepted on any terms without an acknowledgment of this right. This right to the fisheries is summed up by John Adams in the following language: "We discovered them, we explored them, we discovered and settled the countries round about them at our own expense, labor, risk, and industry, without any assistance from Great Britain. We have possessed, and occupied, exercised and practised them from the beginning. ---

"If Conquest can give any right, our right is at least equal and common with Englishmen in any part of the world. Indeed it is incomparably superior, for we conquered all the countries about the fisheries; we conquered Cape Breton, Nova Scotia, and dispossessed the French, both hostile and neutral."

Great Britain took exception to this

right as claimed by the colonies and held that the fisheries had always belonged to the Crown of Great Britain and that the Americans ^{erected} ~~held~~ them only as subjects of the Crown, consequently they lost this right when they broke away from the mother country and declared their independence. But Yankee determination and persistence triumphed at last over British diplomacy. The recognition, by Great Britain in the treaty of 1783, of the liberty of Americans to the free use of the fisheries settled the question till after the second war with England. Nor was there any doubt as to the intent or ^{did} ~~any~~ question about the interpretation of the fisheries clause till it was brought up before the British and American peace commissioners in 1814. The British negotiators claimed that the war of 1812 put an end to the treaty of '83 respecting the fisheries and that it would be necessary to ^{make new} stipulations in reference to them. The American Commissioners, all able representations, J. Q. Adams, Bayard, Russell and Gallatin held that the war did not affect the treaty; and surely not the third clause any more than the first and second clauses which acknowledges our independence and ^{provisions} territorial limits. This question was the principal stumbling block in negotiating the treaty.

The United States negotiators held to this liberty of fishing as acknowledged in the peace of 1783 with unyielding firmness. The result was that the Treaty of Ghent was framed and ratified without any reference to the fisheries. The American fishermen still had the same privileges that were granted in the original treaty. This was a disappointment to the Canadian fishermen, who recognized their inability to compete with the hardy New Englanders though they had the advantage of being the first on the grounds. They at once began a policy they have carried out ever since when they wished to secure any concessions from the United States, harassing our fishermen in every possible manner, by denying them the right of commerce by refusing favors due our ~~fishermen~~ ^{fishermen} under the rules of comity and humanity observed between civilized nations. To settle difficulties the Fisheries Convention of 1818 was agreed upon between Great Britain and the United States. The action of this convention needs to be studied closely for it is out of the different interpretations of the treaty by each party that all these disputes concerning the rights of our fishermen have arisen. The old question as to the right of Americans to fish along Canadian coasts and the new one respecting

the effect of the war upon the former treaty were the chief points of discussion.

The first point was certainly one difficult of solution; but the second argument of Great Britain that the war negated the former treaty stipulations concerning the ~~treaty~~ fisheries was so persistently contended for only to open up a way by which the first point could be made a question of negotiations.

As to the effect of war upon treaties Field states this rule: "War does not affect the compacts of a nation except when so provided in such contracts, except also that executory stipulations in a special compact between belligerents, which by their nature are applicable only in time of peace are suspended by war." This it seems to me covers the point; nor can it in any wise come under the exception. Had the fisheries been one of the causes of the war then the result of the war would have determined the validity of the clause in the former treaty respecting them. That this was not one of the causes of the war is evident from the fact that our commissioners had no instructions whatever respecting the fisheries and had not even been considered by them.

Neither side yielded in its convictions to the arguments of the other. And as neither nation was eager for a ^{another} continuation of the war there

was nothing left but for each to compromise her interests in part. The result was, that the United States made concessions fatal to the interests of her fishermen. On the 20th of October 1818, the following treaty was agreed to by the commissioners. Because of its bearing upon the fishery question since then, as upon the purpose and interpretation of this treaty the questions of dispute must be settled as far as treaties affect it I will give the first clause provisions of this treaty:

"Whereas, differences have arisen respecting the liberty claimed by the U.S. for the inhabitants thereof, to take, dry and cure fish on certain coasts, bays, harbors and creeks of his Britannic Majesty's dominions in America it is agreed between the high contracting parties that the inhabitants of the said U.S. shall have, forever, in common with the subjects of his Britannic Majesty the liberty to take fish of every kind - (1) On that part of the ^{southern} coast of Newfoundland which extends from Cape Ray to the Barneau Islands on the western and ~~southern~~ coasts of Newfoundland from said Cape Ray to the Quirpon Island.

2) On the shores of the Magdalen Islands.
3. And also on the coast, bays, harbors and creeks from Mt Joly on the southern coasts of Labrador, to and through the straits of Belle Isle, and thence northwardly indefinitely along the coasts

without prejudice however to any of the ^{exclusive} rights of the Hudson's Bay Company & (And provisions that the American fishermen could dry & cure fish on certain unsettled bays, harbors & creeks.)

And the United States hereby renounce forever ~~any~~ liberty heretofore enjoyed or claimed by the inhabitants thereof to take, dry or cure fish on or within (3) marine miles of any of the bays harbors or coasts or creeks ~~not~~ ^{not} his Britannic Majesty's not included within the above mentioned limits.

Provided, however that the American fishermen shall be permitted to enter such bays or harbors (1) for the purpose of shelter and (2) of repairing damages therein; (3) of purchasing wood and (4) of obtaining water and for no other purpose whatever. But they shall be under such restrictions as ~~shall~~ be necessary to prevent their taking drying & curing fish therein, or in any other manner whatever abusing the privileges hereby reserved to them.

In the treaty of 1783 the rights of American fishermen recognized were: 1) to enjoy unmolested to take fish ~~anywhere~~ ^{anywhere} the inhabitants of both countries were accustomed at any time before to fish. By the treaty of 1818 American fishermen were restricted in their fishing to certain parts of the coasts

of Newfoundland and Labrador and the Magdalen Islands. And the United States renounces forever the liberty theretofore enjoyed of fishing, drying or curing within three marine miles of British coasts ~~and~~ America not included in the above limits.

Under the execution of this treaty various questions of dispute soon arose.

One of the first of these questions was that respecting the three mile limit, whether this line was to be drawn from headland to headland or should be an irregular line drawn so as to be nowhen within three miles of ~~the~~ coast. The interpretation of the Canadian authorities, and its execution kept American fishermen not only away from the coasts as was intended but even drove them from waters recognized as belonging to the high seas.

From the wording of the treaty the Canadian interpretation seems quite sustainable. Since the limits are prescribed by the treaty as three miles from any of the coasts, bays, creeks and harbors surely fishing crews not within three miles of these coasts, creeks etc should not be molested. Canada, nevertheless, held the opposite view and attempted to enforce the restrictions.

Secondly Canada held that the liberty granted to enter bays and harbors to obtain wood and shelter and to repair damages only secured them

this privilege when it was actually necessary for the safety of the crew, and did not grant the privilege to enter ports to procure ^{purchase bait} wood, and repair damages for the purpose of continuing the fishing excursion. This limitation put the Americans to great inconveniences.

The injustice done ^{U.S.} fishing crews ~~and~~ the seizure of our vessels by Canadians and the condemnation of these vessels by Canadian officers and the constant-collision of the fishing crews of the two nations threatened to bring the two countries to actual hostilities unless these difficulties were settled in some way.

In 1854 after 36 years of continual strife a treaty of reciprocity was made. This treaty was to be binding for ten years and after that could be terminated by either nation after one years notice. Canada, through the diplomacy of her negotiators, Lord Elgin, Gov. Gen. of Canada, secured a decided commercial advantage in that all her raw material was admitted free while our manufactured articles were taxed with heavy duties. In 1866 this treaty was terminated by the United States notice having been given of this intention one year previous. The treaty of 1818 was then in force till 1871 when by the Treaty of Washington the rights of each to fish on the coasts of the other nation were fixed substantially the

same as in the Reciprocity Treaty of '84.
 Fish and fish oil were to be admitted into
 each country free of duty. This ^{provision} clause was
 of decided advantage to Canada. But overesti-
 mating the advantages of free fisheries to the
 United States the British Commissioners demanded
 an additional return for these privileges.
 The U. S. Commissioners considered that free
 fish and fish oil would be more than an equivalent
 return to Canada for the free fisheries. They also
 intimated that \$1,000,000 was the largest sum the
 United States would pay for the benefit of the inshore
 fisheries and not admit fish and fish oil free of duty.
 Unable to agree that the privileges granted by
 each were reciprocally equal or what would
 equalize them the matter was ~~settled~~ ^{arranged} by the
 inserting the XXII article, which provided
 That inasmuch as Great Britain asserted that
 the privileges accorded the United States were
 greater than those granted in return to ~~Great~~ ^{and also holds}
 Britain and that the U. S. denies this, that
 a special commission be appointed to deter-
 mine what if anything ~~was~~ ^{is} compensation is
 due Great Britain from the United States.
 But it failed to state that the U. S. claimed that the
 advantage was in favor of Great Britain. It seems
 to have been from carelessness on the
 part of our Commissioners that this clause
 was so worded as to be a decided advantage

to Great Britain, an advantage not at all foreseen by our commissioners and better than could have been expected by the British. This was a burdensome provision both as to how the commissioners should be appointed and what they should do ~~after~~ assembled. The result of the Halifax Commission, as it was called, was that the United States ~~was~~ adjudged debtor to England the sum of \$5,000,000 in addition to the seven millions duties paid for the use of the British inshore fisheries for the twelve years previous.

The Treaty of Washington respecting the fisheries was terminated by Act of U.S. July 1st 1886. And so far as treaties affect the present affairs that of 1818 is the only authority. The present difficulties arise from the unneighborly and in some cases inhuman actions of Canadian authorities toward our fishing vessels. The strict letter of the treaty of 1818 is enforced according to Canadian interpretations. Our crews have been refused the commercial privileges that we grant Canadian vessels in our ports. Trade and commerce is entirely forbidden our fishing vessels in their ports. Food and water ~~actually~~ needed not to pursue their fishing excursions but to take them to our ports has been refused. This action of Canada can be explained only

on the ground that she expects to drive the United States as she has done twice before to enter into a reciprocity treaty of commerce

Our Minister to England Mr Phelps says in his letter to Lord Rosebury June 2. 1886 respecting some seizures of vessels reported: "It seems to me impossible to escape the conclusion that this and other similar seizures were made by the Canadian authorities for the deliberate purpose of harassing and embarrassing the

American vessels in pursuit of their lawful employment. The real source of the difficulty that has arisen is well understood. It is to be found in the irritation that has taken among a portion of the Canadian people on account of the termination by the United States government of the treaty of Washington on the 1st of July last, whereby fish imported from Canada into the United States, and which so long as that treaty remained in force was admitted free, is now liable to the import duty provided by the general revenue laws, and the opinion appears to have gained ground in Canada that the United States may be driven, by harassing and annoying their fishermen, into the adoption of a new treaty by which Canadian fish shall be ~~free~~ admitted free of duty".

These actions of the Canadians were not done

unauthoritatively. In 1886 the Canadian Parliament passed a bill, which was approved by the Queen and Council, making lawful and encouraging the seizure, by Canadian authorities, of any American vessels which shall enter a Canadian port in violation of the local laws and the Canadians themselves to be the sole judges of what is in violation of their laws. It also confers the right of search upon the high seas and provides for the punishment of the captured crew by fine, and besides confiscating the vessel. This extraordinary action has been treated rightly by the United States when the last Congress empowered the President to retaliate upon Canadian trade by forbidding all or part of the Canadian trade with this country. The interdiction of trade with Canada will fall more heavily upon Canada than upon the United States. And even if it did, the Americans will sacrifice the few pennies when the honor of the country is at stake. It was no idle blow of Senator Ingalls when he said that this dispute must be settled by diplomacy or war.

Any fair adjustment of these difficulties will be of great advantage to both countries. In the next negotiation must be settled the questions as to the three mile limit, and that of commercial privileges and all the other

vexatious questions that have arisen out of the ambiguity of the treaty of 1818.

It is to be hoped that ^{the} recent action of the United States will bring Great Britain to a ~~recognition~~ ^{knowledge} of the unjust actions of the Canadian authorities and that it is incumbent upon Great Britain herself to secure the merchantmen and vessels of a friendly nation against the injustice of local laws that are in violation of treaty and of international commercial privileges.

Not only this but also that the most vexatious questions between Great Britain and the United States may be finally and satisfactorily settled not by war but by negotiations.